UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ADAM JOHNSTON, a minor, by SUSAN JOHNSTON, his mother and next friend, and SUSAN JOHNSTON and GARNETT JOHNSTON,	)	
PLAINTIFFS	)	**CIVIL NO. 96-192-P-H**
v.	)	
DEERE & COMPANY,	)	
DEFENDANT	)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED ON MAINE STATE LAW

Adam Johnston and his parents are suing the manufacturer of a riding lawn mower because Adam's foot was severely injured by the spinning blades of the mower which, the Johnstons claim, was being operated in reverse. Defendant Deere & Company ("Deere") has moved for summary judgment. The motion is **GRANTED IN PART** and **DENIED IN PART** as follows.

COUNT I

Summary judgment on Count I, strict liability for defective product, is **DENIED**. To survive summary judgment, "a plaintiff must establish at least a genuine issue of material fact on every element essential to his case in chief." Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir.

1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 504 U.S. 985 (1992). Deere argues that the Johnstons fail to establish a factual issue regarding causation, specifically: (1) a lack of evidence that the mower was operating in reverse at the time of the accident, making it impossible to show that absence of a no-mow-in-reverse device caused the injury, and (2) a significant, unforeseeable modification to the machine, the installation of a shelf on the back, allegedly playing a causal role in the accident.

First, I find that there is sufficient evidence that the mower was operating in reverse to make this a jury issue. Although there are some ambiguous or contradictory statements from the driver of the mower, Aaron Cieslak, he stated clearly at one point that he "was moving backwards," as opposed to being "about to back up," when the accident happened. Cieslak Dep. at 54. (In other testimony, Cieslak states that when he realized there had been an accident, he was either in reverse or had switched the gear to neutral. Id. at 54-55.) He also says that he had been looking over his right shoulder and moving in reverse; he turned his head around to look forward; once he had turned around he saw Adam caught under the left side of the mower. Id. at 31-33, 50. Cieslak says, "I was moving backwards when I turned around." Id. at 54. The jury could find from this evidence that the accident occurred before Cieslak finished turning around, and while he was still in reverse, since Cieslak states that Adam was already entangled in the blades when he had turned around and saw Adam.[1] Id. at 33.

[1] Brian Kelley, a boy who was present when the accident occurred, recalls the events differently. Kelley says that Adam was riding on the back of the mower with Cieslak while it was in reverse, and then got off only after the mower had completed traveling in reverse. Kelley Dep. at 9, 12-14. Kelley's testimony, however, only creates a genuine issue of material fact regarding whether the mower was in reverse. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (A "genuine issue" exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). When there is a "genuine issue," summary judgment is inappropriate. Fed. R. Civ. P. 56(c).

Second, with regard to the modification to the mower, I cannot find as a matter of law that building a shelf on the back met the Law Court's standard for such a defense—that it be "an unforeseen and intervening proximate cause of the injury." Marois v. Paper Converting Mach. Co., 539 A.2d 621, 624 (Me. 1988). Deere does not show how the shelf might have caused Adam's injury. If a connection between the modification and the injury is shown at trial, then this could be an issue for the jury, but summary judgment on this record is not appropriate.

COUNTS II AND IV

Cieslak's statements that he "knew it was dangerous to operate one of these vehicles around little kids," Cieslak Dep. at 43 (answering "yes" to lawyer's question), and that he is "not supposed to mow [the lawn] when the kids are there[,]" id. at 21, indicate awareness of the mower's general dangerousness, but do not indicate awareness of the specific danger that the blades rotate in reverse. See Marois, 539 A.2d at 624-25 ("[T]he jury could have rationally found that, although generally aware of the inherent danger of the operation, the specific danger of the machine's design and clearing process was not obvious to, or known by, the Plaintiff."). Meanwhile, Cieslak said that he was not sure at the time of the accident whether the mower blades spun while he was moving in reverse. Cieslak Dep. at 52-53 ("I'm not sure if [the blades] were still going. Now I know they are but I wasn't sure then if they were or they shut off."). Therefore, Deere's independent knowledge argument, see Lussier v. Louisville Ladder Co., 938 F.2d 299, 300-01 (1st Cir. 1991) (affirming summary judgment on failure to warn claim because plaintiff had independent knowledge of the danger), and open and adequate warnings argument, see Lorfano v. Dura Stone Steps, Inc., 569 A.2d 195, 197 (Me. 1990) (affirming summary judgment that manufacturer had no duty to warn of

obvious and apparent dangers), do not persuade me to make a finding against the Johnstons as a matter of law. This is not a case like Plante v. Hobart Corp., 771 F.2d 617, 621 (1st Cir. 1985), where the plaintiff testified he recognized the danger of sticking his hand into a running grinder, but did so anyway. We have no such specific testimony here regarding the mower blades spinning in reverse.

Furthermore, this record does not support a finding that the warnings were adequate as a matter of law. First, there were no warnings on the mower addressing the specific danger that the blades spun in reverse. Second, with regard to the warnings on the mower, including a caution decal that said "Stay clear of power driven parts . . . Keep people and pets a safe distance away from mower," Def.'s Stmt. Mat. Facts ¶ 12, there is a material fact in dispute regarding whether they were worn away and illegible, Pls.' Stmt. Mat. Facts ¶ 9, or painted over by the Johnstons, Def.'s Reply Supp. Mot. Summ. J. at 2. Third, although the operator's manual includes more specific information than can be found on the decals regarding the danger of mowing in reverse, and says, "Disengage the mower before backing up. DO NOT mow in reverse unless obsolutely [sic] necessary[,]" Def.'s Stmt. Mat. Facts ¶ 11, Cieslak testified that he did not read the manual. Cieslak Dep. at 16, 44. Deere argues that the manufacturer may reasonably assume warnings are read and understood, and cites the Restatement (Second) of Torts § 402A, comment j, for this proposition. That comment, however, is addressed to warnings "on the container," rather than in a manual. Restatement (Second) of Torts § 402A, cmt. j (1965). In sum, whether warnings in the manual and on the decals are adequate, I conclude, is a matter for the jury on these facts.

Accordingly, summary judgment on all of Count II, strict liability for failure to warn, and portions of Count IV, insofar as it asserts negligent failure to warn, is **DENIED**.

COUNT III

The Johnstons concede that summary judgment should be granted against them with regard to any express warranty claims because there is no evidence of reliance by the purchaser on representations made by Deere. Pls.' Objection Def.'s Mot. Dismiss at 15-16. Summary judgment is accordingly **GRANTED**.

With regard to the Johnstons' implied warranty of merchantability claim, Deere initially presented a disclaimer argument based on 11 M.R.S.A. § 2-316, but then agreed that the mower is excluded from that section as a "consumer good" under subsection (5). Def.'s Reply Supp. Mot. Summ. J. at 4. Deere's remaining warranty argument, therefore, is that the Johnstons have failed to prove causation because the machine was modified. Consistent with my ruling above regarding Count I, the modification and related causation issues should properly go to the jury; I refrain from granting summary judgment on the record before me. Summary judgment on the claim of breach of implied warranty of merchantability is accordingly **DENIED**.

COUNT V

According to Tuttle v. Raymond, punitive damages are available in tort actions "only if the defendant acted with malice." 494 A.2d 1353, 1361 (Me. 1985). Malice may be express, where it is "motivated by ill will toward the defendant," or implied, "where deliberate conduct . . . is so outrageous that malice toward a person injured as a result of that conduct can be implied." Id. Here, there is no evidence of express malice, so I am left to consider whether a jury may imply malice under Maine's standard of "clear and convincing" evidence. Id. at 1363. I find that there is not

sufficient evidence to meet this standard. At best the Johnstons have made a showing of reckless conduct on the part of Deere. Contrary to the Johnstons' argument in their brief, they have pointed to no evidence in the record that Deere was aware of "hundreds of young children each year" dying due to mowing in reverse. Pls.' Objection Def.'s Mot. Dismiss at 18. The most that Deere has said in the deposition excerpts that the Johnstons refer to is that the company would expect some amount of back-over accidents per year, Arfstrom Dep. at 181-82, and that it may be competitively disadvantageous to install a no-mow-in-reverse device, Eklund Dep. at 102.

The Johnstons' expert calculates that one mower out of every 5700 that is produced will be involved in a back-over accident at some time in its life, and that these accidents were happening in the early 1980s at a rate of 120 to 150 accidents per year. Reed Dep. at 49. The expert relies on figures from a study by the Consumer Product Safety Commission ("CPSC"). Id. The Johnstons' complaint implies that Deere had this same knowledge at least in part through an industry trade group, the Outdoor Power Equipment Institute ("OPEI"). Am. Compl. ¶ 46. However, nowhere in the record is Deere's awareness of the CPSC figures established, nor is there any other link between the CPSC study and Deere. I do not find from this record that knowledge of CPSC information may be imputed to Deere to support a finding of malice.

I find as a matter of law, therefore, that this the record cannot support a finding that Deere acted with malice. See Kelleher v. Boise Cascade Corp., 683 F. Supp. 858, 860 (D. Me. 1988) (granting summary judgment on punitive damages because there was no evidence of malice). Accordingly, summary judgment on Count V is **GRANTED**.

SO ORDERED.

DATED THIS 9TH DAY OF APRIL, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE